MICHAEL J. BETTINGER (State Bar No. 122196)
RACHEL R. DAVIDSON (State Bar No. 215517)
PRESTON GATES & ELLIS LLP
55 Second Street, Suite 1700
San Francisco, California 94105-3493
Telephone: (415) 882-8200
Facsimile: (415) 882-8220

KATHLEEN O. PETERSON (State Bar No. 124791)
PRESTON GATES & ELLIS LLP
1900 Main Street, Sixth Floor
Irvine, CA 92614-7319
Telephone: (949) 253-0900
Facsimile: (949) 253-0902

Attorneys for Defendant
MICROSOFT CORPORATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GOOGLE, INC. and KAI-FU LEE,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Case No. C 05-03095 RMW

MICROSOFT'S ANSWER AND AFFIRMATIVE DEFENSES

ANSWER

Defendant Microsoft Corporation ("Microsoft") answers the allegations of the Complaint of plaintiff Google, Inc. and Kai-Fu Lee (collectively "Plaintiffs") as follows:

1. Paragraph 1 of the Complaint contains contentions of law that do not require a response. To the extent a response is required, all allegations in Paragraph 1 of the Complaint are denied. Microsoft specifically denies that the non-competition provision in its contract

Dockets.Justia.com

with Dr. Lee is governed by California law; specifically denies that a limited non-competition provision, particularly when entered into for the purpose of protecting confidential information and trade secrets, violates California public policy; specifically denies that the non-competition provision in Dr. Lee's employment agreement is invalid or unenforceable under California law; and specifically denies that Microsoft's efforts to enforce the provision violate California law or constitute an unlawful business practice of illegal restraint of trade.

2. In response to Paragraph 2 of the Complaint, Microsoft admits that Google is a Delaware corporation with its principal place of business in California. Because Microsoft is without information and belief as to whether Google is registered to do business in California, or whether Mountain View, California is its principal place of business, those allegations are denied.

3. In response to Paragraph 3 of the Complaint, Microsoft admits that Dr. Lee is now employed by Google. Because Microsoft is without information and belief as to the date of Dr. Lee's hiring, allegations regarding that date are denied. Because Microsoft is without information and belief as to Dr. Lee's current residence, those allegations are denied. Microsoft admits that Dr. Lee was employed by Microsoft until he resigned on July 18, 2005.

4. In response to Paragraph 4 of the Complaint, Microsoft admits that it is a Washington corporation, registered to do business in California, with its principal place of business in Redmond, Washington.

5. Microsoft is without information and belief as to the identify of the unnamed and unidentified defendants DOES 1 through 20 referred to in Paragraph 5 of the Complaint, and for that reason all allegations in Paragraph 5 of the Complaint are denied.

6. In response to Paragraph 6 of the Complaint, Microsoft admits that a primary,

or the primary focus of Google is search technology, and that Google intends to sell its products and services to parts of the world including China. Microsoft is without information and belief as to the other allegations in Paragraph 6 of the Complaint, and for that reason all allegations in Paragraph 6 that are not specifically admitted are denied.

7. Microsoft is without information and belief as to the allegations in Paragraph 7 of the Complaint, which for that reason are denied.

8. In response to Paragraph 8 of the Complaint, Microsoft admits that it has California offices. Microsoft admits that it has had open positions for employment in California. Microsoft is without information and belief as to the remaining allegations in Paragraph 8 of the Complaint, which for that reason are denied.

9. In response to Paragraph 9 of the Complaint, Microsoft admits that Dr. Lee is a computer scientist; that he holds a doctorate from Carnegie Mellon and a bachelor’s degree in computer science from Columbia University; that he is a citizen of the United States; that he lived in the state of Washington and was employed by Microsoft between August 2000 and mid-July 2005 as a Vice President; that he worked in Microsoft’s Natural Interactive Services Division; and that, prior to joining Microsoft, he worked for Silicon Graphics and Apple Computer. All allegations in Paragraph 9 of the Complaint not specifically admitted are denied.

10. In response to Paragraph 10 of the Complaint, Microsoft admits that Dr. Lee was the initial employee of Microsoft Research Asia, in China, in 1998; that Dr. Lee began work for Microsoft in Redmond, Washington and signed the then-standard Microsoft Corporation Employee Agreement (the “Agreement”) on August 8, 2000; that Paragraph 9 of the Agreement contained a non-competition provision, portions of which are accurately

quoted in Paragraph 10 of the Complaint; and that all or virtually all Microsoft employees based in Washington are required to sign an equivalent non-competition agreement as a condition of their employment. All allegations in Paragraph 10 of the Complaint that are not specifically admitted are denied.

11. In response to Paragraph 11 of the Complaint, Microsoft admits that Dr. Lee went on sabbatical in June 2005. Microsoft admits that on July 5, 2005, Dr. Lee informed his supervisor, Eric Rudder, that he did not plan to return from sabbatical and that he had spoken with Google regarding employment by it. Microsoft admits that Dr. Lee submitted his resignation letter to Microsoft on July 18, 2005, and that he was served with a Washington State court Complaint filed by Microsoft against Lee and Google, a document that speaks for itself, on July 18, 2005. All allegations in Paragraph 11 of the Complaint that are not specifically admitted are denied.

12. Microsoft is without information and belief as to the truth of the allegations in Paragraph 12 of the Complaint, which are accordingly denied.

13. Microsoft is without information and belief as to the truth of the allegations in Paragraph 13 of the Complaint, which are accordingly denied.

14. Microsoft denies the allegations contained in paragraph 14.

15. Paragraph 15 of the Complaint does not require a response; to the extent a response is required, the allegations incorporated in Paragraph 15 are denied except to the extent previously specifically admitted.

16. In response to Paragraph 16 of the Complaint, Microsoft admits that it has filed a lawsuit against Google and Dr. Lee in the state of Washington asserting that Dr. Lee is in violation of the Agreement, that the conduct of Google and Dr. Lee constitutes threatened

misappropriation of trade secrets in violation of RCW 19.108 et seq., and that Google's conduct constitutes or threatens to constitute tortuous interference with contractual relations. All allegations in Paragraph 16 of the Complaint not specifically admitted are denied.

17. In response to Paragraph 17 of the Complaint, Microsoft specifically denies that Dr. Lee has a right to be employed by Google in a way that would violate the terms of the Agreement. Because Microsoft is without information and belief as to the remaining allegations of Paragraph 17 of the Complaint, those allegations are denied.

18. Paragraph 18 of the Complaint contains legal contentions that do not require a response. To the extent a response is required, Microsoft admits that California Business and Professions Code section 16600 is a component of Chapter 1 of Part Two of Division Seven of the Business and Professions Code, and that the language of section 16600 speaks for itself. Microsoft specifically denies that the non-competition provision in Dr. Lee's Agreement is invalid and unenforceable under California law, and also denies that it is governed by California law. To the extent not specifically admitted, all allegations in Paragraph 18 of the Complaint are denied.

19. In response to Paragraph 19 of the Complaint, Microsoft admits that the Microsoft Corporation Employee Agreement signed by Dr. Lee, which contains a non-competition provision, provides that it is governed by the laws of the State of Washington and that exclusive venue for any action arising out of the Agreement shall lie in state or federal court located in King County, Washington. The remaining allegations of Paragraph 19 of the Complaint are assertions of law that do not require a response. To the extent a response is required, Microsoft specifically denies that the State of California has a greater interest than the State of Washington in having its laws applied to a contract that was formed in the State

of Washington between two Washington residents. Moreover, Microsoft denies that the non-competition provision in Dr. Lee's Agreement is invalid and unenforceable under California law or that it otherwise violates California public policy. All allegations in Paragraph 19 of the Complaint not specifically admitted are denied.

20. Paragraph 20 of the Complaint contains a legal contention that does not require a response. To the extent that a response is required, all allegations in Paragraph 20 are denied.

21. Paragraph 21 of the Complaint states a request for relief that does not require a response. Microsoft specifically denies that Google and Dr. Lee are entitled to a judicial determination and declaration that this case may properly proceed in California; specifically denies that California law governs the enforceability of the non-competition provision in the Agreement; and specifically denies that the non-competition provision is invalid and unenforceable under California law.

22. The Prayer for Relief in the Complaint contains a request for relief that does not require a response. To the extent that a response is required, Microsoft denies that Google and Dr. Lee are entitled to any relief.

AFFIRMATIVE DEFENSES

Microsoft states the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

Plaintiff Lee has consented to venue in King County, Washington under the terms of the Agreement between Microsoft and Dr. Lee. Plaintiff Google is bound by that consent. Plaintiffs' Complaint is therefore brought in an improper venue.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' Complaint suffers from lack of personal jurisdiction, which is exclusive to King County, Washington under the terms of the Agreement between Microsoft and Dr. Lee.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' request for declaratory relief should be stayed, and/or this court should abstain from hearing this case, in favor of the first-filed, ongoing, and more advanced Washington State court action.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' request for relief is barred by collateral estoppel and/or res judicata, in light of the Washington court's ruling on Microsoft's request for a temporary restraining order.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' request for relief is barred by the terms of Microsoft's contract with Dr. Lee.

PRAYER FOR RELIEF

WHEREFORE, Microsoft requests the following relief:

1. Dismissal of Plaintiffs' Complaint;

2. An award of Microsoft's attorneys' fees and costs incurred, pursuant to the Agreement between Microsoft and Kai-Fu Lee; and

3. Such other relief as the Court deems just and equitable.

DATED: August 11, 2005

PRESTON GATES & ELLIS LLP

By*/s/ Michael J. Bettinger*
Michael J. Bettinger
Attorneys for Defendant
Microsoft Corporation